Supreme Court, U. S.
FILED
NOV 6 1979

In The

Supreme Court of the United States

October Term, 1979

No. 79-578

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARTIN IRA KLEIN
OLSHAN, GRUNDMAN & FROME
Attorneys for Respondents
505 Park Avenue
New York, New York 10022
(212) 753-7200

RICHARD H. ABELSON
DANIEL BESDIN
Of Counsel

1821 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

In The

Supreme Court of the United States

October Term, 1979

No. 79-578

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Were petitioners denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the granting of summary judgment to respondent, after a full consideration of the case on papers from both parties, even if error were committed by the state courts?

STATEMENT OF THE CASE

By this action, petitioners seek to vacate and set aside a judgment of foreclosure and sale dated November 28, 1975 covering a parcel of property located in Bayport, New York, (the "Flowervale Property") formerly owned by petitioner Flowervale, Inc. ("Flowervale") and further claim $10,000,000 in compensatory and punitive damages. The Flowervale Property was conveyed to respondent Inland Credit Corporation ("Inland") after judicial sale, held pursuant to that judgment of foreclosure and sale on January 7, 1976.

The foreclosure action against petitioner Flowervale resulting in the disputed judgment of foreclosure, was commenced by service of a summons and complaint on February 10, 1975. Service of that summons was made on petitioner Edward Rager, Flowervale's principal stockholder, its President, and, himself, an attorney, although he was not a party to the foreclosure action. Although Flowervale's time to do so expired on March 2nd, 1975, Mr. Rager failed to answer or otherwise appear in the foreclosure action on behalf of Flowervale. It was not until June 25, 1975 that Flowervale moved to open that default, by motion returnable July 1, 1975. A copy of a proposed answer (52a)[1] to the foreclosure complaint was attached to Mr. Rager's motion papers, identical, in almost every material respect, to the complaint (13a) in the case at bar. For example, that proposed answer alleges, in its first defense, that on December 6, 1974, Inspiration Enterprises, Inc. another Rager corporation, delivered a deed to a parcel of property in New York County to Ardisco Financial Corporation, a wholly owned subsidiary of Inland. It then alleges that the deed was delivered in consideration of an agreement by Inland to use its "best efforts" to sell that parcel of New York property and to then apply the sale proceeds first to the past due taxes and the

1. References are to pages of the appendix to the petition.

mortgage covering that New York property and then, in the event there were a surplus, to the past due taxes and mortgage covering the Flowervale Property. The answer also alleges that Inland had agreed not to foreclose the mortgage covering the Flowervale Property unless the first mortgage held by Suburbia Federal Savings and Loan Association ("Suburbia") was declared to be in default. It is finally alleged in the proposed answer that this agreement was made by Inland as part of a fraudulent scheme to trick Flowervale out of its valuable property. Thus, the first defense of the proposed answer precisely parallels the allegations in the first cause of action of the complaint at bar.

On September 3, 1975, the New York Supreme Court, Suffolk County (Pittoni, J.) denied Mr. Rager's motion to open and set aside Flowervale's default in the foreclosure stating:

> "The moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense. In the rambling, incoherent moving affidavit by the attorney for the defendant, there is no denial that process was served, there is no explanation whatever as to why defendant defaulted, *and there is no suggestion as to a meritorious defense to this action for foreclosure.*" (63a). (Emphasis added.)

Prior to the making of the motion, Mr. Rager, on behalf of Flowervale, had been served with all relevant papers in the foreclosure proceeding. After Mr. Justice Pittoni's decision, Inland caused Mr. Rager, as Flowervale's attorney, and indeed, as its President and chief executive officer, to be served with notice of all proceedings which took place in the foreclosure action, including notice of settlement and of entry of the judgment of foreclosure and sale and notice of the sale itself,

which, as noted, took place on January 7, 1976, after due notice thereof had been published.

Both the proposed answer attached to Mr. Rager's motion, and the complaint in the case at bar are grounded in an imaginary agreement by Inland not to foreclose its mortgage on the Flowervale Property unless the first mortgage held by Suburbia was about to be foreclosed. The only notation of that so-called "agreement" by Inland are unintelligible pen additions made by Edward Rager, without Inland's knowledge or consent on a copy of Inland's December 4th letter (45a) to Mrs. Rager, which the lower court in this case was unable to read, and found, in its decision (3a, 5a) from merely reading the documents submitted, had not been initialled or agreed to by Inland.

Thus, the only agreement in the record below which pertains to the Flowervale Property is that attached to the complaint as Exhibit B, the letter of November 27, 1974, (26a) which does no more than extend payment of Inland's mortgage, *provided Flowervale paid all installments of taxes and of principal and interest under the Suburbia Mortgage.* There has never been any contention made that Flowervale made those payments because the fact is that Flowervale was always in default. It was also undisputed in the lower court that Flowervale received notice of all proceedings in the foreclosure and defaulted.

Based upon the foregoing facts, respondents moved for summary judgment in the instant case on the ground, among others, that the complaint failed to plead facts demonstrating that the judgment of foreclosure and sale in the foreclosure action had been obtained by fraud or other improper means as petitioners were required to show by law. The motion was granted by written decision dated December 1st, 1977 (3a) and judgment was entered in accordance therewith on January 13, 1978 (8a).

On or about January 31, 1978, the petitioners moved to vacate and set aside the January 13th, 1978 judgment alleging that "new and additional facts" purportedly not before the court on the original motion for summary judgment had been discovered. On May 11th, 1978, the New York Supreme Court, Suffolk County (Underwood, J.) denied that motion for renewal and reargument (7a). Petitioners appealed from both the judgment of January 13th, 1978 and the order denying reargument or renewal to the New York Supreme Court, Appellate Division, Second Department, and the two appeals were consolidated by order of that court dated July 6, 1978. By order dated April 2nd, 1979, (10a), the Appellate Division unanimously affirmed that judgment and dismissed the appeal from the May 11th order, denying reargument. On July 10, 1979, the New York Court of Appeals denied leave to appeal (12a). This petition followed.

REASON FOR DENYING THE WRIT

Petitioners' right to due process of law was not denied by the granting of summary judgment to respondents after a full consideration of the case on its merits, even if such granting was error.

It has long been settled that procedural due process under the Fifth and Fourteenth Amendments to the Constitution is satisfied if a party is given proper and adequate notice and a meaningful opportunity to be heard. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). Nor does that requirement for notice and a meaningful opportunity to be heard mandate that state procedure take any particular form. *Mitchell v. W.T. Grant Co.,* 416 U.S. 500, 510 (1974); *Stump v. Bennett,* 398 F.2d 111, 113-114 (8th Cir. 1968), *cert. denied,* 393 U.S. 1001 (1969). Clearly then, the time honored procedure of summary judgment comes within the limits prescribed by the due process clause. There has never been any question that summary judgment, while denying to a litigant a plenary trial because there are no issues of

material fact to be tried, does not offend the traditional notions of due process. *Ogelsby v. Terminal Transport Co., Inc., etc.*, 543 F.2d 1111 (5th Cir. 1976); *Smart v. Jones*, 530 F.2d 64 (5th Cir. 1976); *Sarela v. Porikos*, 320 F.2d 827 (7th Cir. 1963). The *Ogelsby* case, *supra*, clearly expresses the rule:

> "Ogelsby also contends that the entry of summary judgment in accordance with Fed. R. Civ. P. 56 violates . . . his Fifth Amendment right not to be deprived of property without due process of law. These contentions are meritless. Rule 56 requires due notice of the invocation of its procedures and outlines the type of response required to avoid its strictures. Ogelsby does not dispute that he got this notice. Indeed, his counsel prepared a response supported by a brief and Ogelsby's unsworn statement. Due process does not require more. No constitutional right to a trial exists when after notice and a reasonable opportunity a party fails to make the rule — required demonstration that some dispute of material fact exists which a trial could resolve." *Id.* at 1113.

As in the *Ogelsby* case, petitioners do not deny that they received notice of the motion for summary judgment and submitted full and complete papers, including an extensive brief in opposition thereto, all as provided for in *New York Civil Practice Law and Rules*, R. 3212, (McKinney). They do not deny that they again submitted full papers on yet another motion to reargue, after summary judgment had been granted, and that an extensive brief was submitted by them to the Appellate Division, Second Department, on petitioners' appeal.

In short, the entire basis for this petition is petitioners' erroneous contention that the state courts erred in granting summary judgment to petitioners. Even had that been the case,

it has long been settled that an error of a state court, if otherwise proper procedures have been followed, does not violate due process. *Gryger v. Burke*, 334 U.S. 728 (1948); *Wooster County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Thompson, et al. v. Butler, et al.*, 136 F.2d 644, 648 (8th Cir. 1943); *East Crossroads Center, Inc. v. Mellon-Stuart Company, etc.*, 245 F. Supp. 191, 194 (W.D. Pennsylvania, 1965). In the *Gryger* case, *supra*, this Court stated as follows:

> "Nothing in the record impeaches the fairness and temperateness with which the Trial Judge approached his task. His actions have been affirmed by the highest court of the Commonwealth [of Pennsylvania]. We are not at liberty to conjecture that the Trial Court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation for a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." 334 U.S. at 731.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN IRA KLEIN
OLSHAN, GRUNDMAN & FROME
Attorneys for Respondents

RICHARD H. ABELSON
DANIEL BESDIN
Of Counsel